

**United States Department of Labor
Employees' Compensation Appeals Board**

B.A., Appellant)
and) Docket No. 08-751
DEPARTMENT OF JUSTICE, BUREAU OF) Issued: September 25, 2008
PRISONS, Duluth, MN, Employer)

)

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 16, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 17, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly issued a retroactive wage-earning capacity determination based on the selected position of personnel manager.

FACTUAL HISTORY

The Office accepted that appellant sustained post-traumatic stress disorder as a result of a January 21, 1997 employment incident when a boiler exploded. Appellant received vocational rehabilitation services and a plan was developed for appellant to pursue a bachelor's degree in business management. He began taking classes at a local university. A job classification form for the position of personnel manager (Department of Labor, *Dictionary of Occupational Titles*, DOT # 166.117-018) was completed by a rehabilitation specialist on May 13, 1998. The

rehabilitation specialist indicated that the specific vocational preparation for the position was 4 to 10 years, and appellant did not currently meet the requirements. She noted that appellant had two years experience as a base career adviser and was currently enrolled in college to obtain a bachelors degree in management with a specialization in human resources. The rehabilitation specialist noted: "this combined with his work will give him the SVP [specific vocational preparation]."

Appellant continued to pursue his studies. In a vocational rehabilitation report dated December 12, 2000, the specialist indicated that appellant would graduate in two semesters. On December 29, 2000 appellant elected to receive retirement benefits rather than compensation benefits. Vocational rehabilitation services were terminated. A Form CA-66 dated January 5, 2001 indicated that the rate of pay for the personnel manager position was \$996.73 and positions were available in appellant's commuting area. No comments were provided regarding whether appellant had the specific vocational preparation for the position. A January 5, 2001 CA-66 for the position of employment interviewer reported the SVP was one to two years, and stated that appellant would be able to secure employment based on his experience and completion of more than ¾ of his training for personnel management.

In a decision dated January 23, 2006, the Office advised appellant that it was retroactively reducing his entitlement to compensation for wage loss effective December 29, 2000. It stated that a rehabilitation counselor had reported appellant could secure employment as a personnel manager. According to the Office, appellant had the ability to earn \$996.73 as of December 29, 2000, and the pay rate for his date-of-injury job on December 29, 2000 was \$847.81, resulting in no loss of wage-earning capacity.

Appellant requested a hearing before an Office hearing representative, which was held on November 16, 2006. By decision dated January 17, 2007, the hearing representative affirmed the retroactive wage-earning capacity determination. He also found the wage-earning capacity determination should be modified as of December 10, 2003, based on the medical evidence of record.

LEGAL PRECEDENT

Under section 8115(a) of the Federal Employees' Compensation Act,¹ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.²

¹ 5 U.S.C. § 8115(a).

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴ It is the Office's burden of proof to establish that the selected position represents the claimant's wage-earning capacity.⁵

ANALYSIS

The Office issued a wage-earning capacity determination based on the selected position of personnel manager, retroactive to December 29, 2000, when appellant elected Office of Personnel Management (OPM) retirement benefits. A retroactive determination may be made when the evidence clearly shows that appellant was not totally disabled prior to adjudication, no compensation has been paid for the period of disability in question and vocational rehabilitation services could not be employed.⁶ In this case, the Office had not paid compensation from December 29, 2000, since appellant had selected OPM retirement benefits.

The evidence must, however, show that as of December 29, 2000 appellant had the proper vocational and educational preparation for the position, that he could physically perform the position, and the selected position was available in the local labor market.⁷ As to the specific vocational preparation for the personnel manager position, a rehabilitation counselor had clearly indicated on May 13, 1998 that appellant would have the necessary preparation after he received his bachelor's degree. The record indicates that as of December 29, 2000 appellant had not yet completed his bachelor's degree. The vocational rehabilitation report dated December 12, 2000 indicated that appellant required two additional semesters.

The Office relied upon a rehabilitation counselor in a January 2001 report that appellant had the vocational preparation based on the completion of courses to that time. However the evidence of record does not support such a finding. There is a January 5, 2001 Form CA-66 for the position of employment interviewer that indicates appellant had the vocational preparation for that position, but no similar information was provided for the selected personnel manager position. The evidence does not contain an opinion from a rehabilitation specialist or other probative evidence establishing that, as of December 29, 2000, appellant met the specific

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

⁵ *Richard Alexander*, 48 ECAB 432 (1997).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1995).

⁷ See *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

vocational preparation and general educational development requirements for the selected position. In the absence of such evidence, the Office did not properly issue a retroactive wage-earning capacity determination based on the selected position of personnel manager.

CONCLUSION

The evidence of record does not establish that as of December 29, 2000 appellant had the specific vocational preparation for the selected position of personnel manager, and therefore the Office improperly issued a retroactive wage-earning capacity based on this position.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 17, 2007 is reversed.

Issued: September 25, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board